

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET PHILLIPS, Personal Representative
of the Estate of REGEANA DIANE HERVEY,
deceased,

Plaintiff-Appellee,

v

MIRAC, INC.,

Defendant-Appellant.

FOR PUBLICATION
June 7, 2002
9:05 a.m.

No. 227257
Saginaw Circuit Court
LC No. 98-023923-NI

Updated Copy
August 30, 2002

Before: Gage, P.J., and Hoekstra and Meter, JJ.

METER, J. (*dissenting*).

I respectfully dissent because I believe the damages cap in MCL 257.401(3) violates the right to trial by jury as guaranteed by the Michigan Constitution. I would affirm the trial court's finding of unconstitutionality.

Our constitution states that "[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." Const 1963, art 1, § 14. The owner's liability statute in particular confers a right to trial by jury, because it provides for actual damages and it constituted an action at law at the time the 1963 constitution was adopted. See *Anzaldúa v Band*, 457 Mich 530, 538-539, 548; 578 NW2d 306 (1998).

In Michigan, the right to a jury trial extends to the determination of damages. See, e.g., *Leary v Fisher*, 248 Mich 574, 578; 227 NW 767 (1929), *Equico Lessor, Inc v Original Buscemi's, Inc*, 140 Mich App 532, 536; 364 NW2d 373 (1985), and *Waisanen v Gaspardo*, 30 Mich App 292, 294; 186 NW2d 75 (1971). In *Leary*, *supra* at 576, the plaintiff sued the defendant for injuries sustained when the defendant hit him with an automobile. The Supreme Court stated that "[p]laintiff is entitled to a right of trial by jury, and one of the necessary incidents of the trial of cases of this character by jury is that the jury shall fix the amount of damages." *Id.* at 578 (emphasis added).

In light of these cases and in light of our constitution's language, the necessary outcome for the instant case appears to me rather clear: Because our constitution confers a right to trial by jury, and because the right to trial by jury in Michigan extends to a determination of damages,

the damages cap in the instant case is unconstitutional. Indeed, if the trial court must automatically reduce the amount of damages assessed by the jury to conform to the statutory cap, then the jury is not "fix[ing] the amount of damages" as required by *Leary*. See *id.*

The majority contends that because the Michigan Constitution provides that "[t]he common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed," see Const 1963, art 3, § 7, the Legislature is free to impose statutory damages caps. The majority states, "Where the Legislature can abolish a cause of action, it necessarily follows that it can limit the damages recoverable for the cause of action." *Ante* at _____. The fatal flaw with this argument is that the existence of a particular cause of action, at least in many instances, is not mandated by *the constitution*. Many causes of action are creatures of the Legislature, and therefore the Legislature is free to abolish these causes of action. The right to a jury trial, on the other hand, is indeed mandated by the constitution, as discussed earlier. Accordingly, the Legislature is *not free* to abrogate this right. In other words, while the Legislature may take away what *it* has given, it may not take away what *the constitution* has given.

Support for this rationale can be found in *Sofie v Fibreboard Corp*, 112 Wash 2d 636, 651-652; 771 P2d 711 (1989), amended 780 P2d 260 (1989). In *Sofie*, the Supreme Court of Washington, responding to a similar argument, stated:

The Legislature has power to shape litigation. Such power, however, has limits: it must not encroach upon constitutional protections. In this case, by denying litigants an essential function of the jury [by way of damages caps], the Legislature has exceeded those limits.

* * *

. . . Because of the constitutional nature of the right to jury trial, litigants have a continued interest in it—it simply cannot be removed by legislative action. *As long as the cause of action continues to exist and the litigants have access to a jury, that right of access remains as long as the cause of action does.* [Emphasis added.]

Similarly, I believe that here, as long as a cause of action remains under the owner's liability statute, litigants are entitled to a jury trial on damages, and this right entails having the jury determine the amount of damages. *Leary, supra* at 578.

The majority alternatively contends that the damages cap in subsection 401(3) does not violate the right to trial by jury because "[t]he damages cap . . . in no way removes from the jury the determination of facts and of the amount of damages that the injured plaintiff incurred." *Ante* at _____. The majority states that "subsection 401(3) simply limits the amount of those damages that can be recovered from a lessor of vehicles." *Ante* at _____. Once again, this logic is fatally flawed. Indeed, in a case such as the instant one, having the jury "determin[e] . . . [the] facts and . . . the amount of damages that the injured plaintiff incurred" but then arbitrarily reducing this

amount to a prescribed statutory number renders the jury's function purely illusory.¹ As noted in *Sophie, supra* at 655:

Respondents also contend that the damages limit affects only the judgment as entered by the court, not the jury's finding of fact. This argument ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages. Respondents are essentially saying that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. *Such an argument pays lip service to the form of the jury but robs the institution of its function.* This court will not construe constitutional rights in such a manner. [Emphasis added.]

A similar rationale was adopted by our neighbor state, Ohio, in *State ex rel Ohio Academy of Trial Lawyers v Sheward*, 86 Ohio St 3d 451, 484-485; 715 NE2d 1062 (1999), in which the court stated, "[A] statute that allows the jury to determine the amount of punitive damages to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the determination in the first instance."

While it is true that a trial court may lower a jury's determination of damages under the doctrine of remittitur, this type of diminution, unlike one that occurs as a result of a statutory damages cap, does not render the jury's role illusory. Indeed, in cases of remittitur, a court may lower the jury's determination of damages *as a matter of law only after determining that the award is unsupported by the evidence introduced at trial.* See *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997). By contrast, a statutory damages cap mandates a reduction solely because of legislative fiat, notwithstanding that a much greater amount of damages may be supported by the evidence introduced at trial.² As noted in *Sophie, supra* at 654:

[R]emittitur is wholly within the power of the trial judge. Within the guidelines of the doctrine, the judge makes the legal conclusion that the jury's damage finding is too high. This judicial finding—arrived at with judicial care—is fundamentally different from a legislatively imposed "remittitur" that operates automatically. . . .

The judge's use of remittitur is, in effect, the result of a legal conclusion that the jury's finding of damages is unsupported by the evidence. The Legislature cannot make such case-by-case determinations. Therefore, the

¹ I note that in the instant case, plaintiff does not have the option, as the majority suggests, of recovering damages from "other tortfeasors," because the negligent driver of the automobile in which plaintiff's decedent was a passenger is not collectible and was uninsured.

² I note that in this case, the jury found damages in the amount of \$900,000, and this amount was reduced to \$250,000 because of an "over/under" agreement entered into by the parties before trial. This diminution of the jury verdict was acceptable because it resulted from an agreement entered into freely and voluntarily by the parties.

legislative damages limit is fundamentally different from the doctrine of remittitur.

In the instant case, the statute at issue required the trial court to arbitrarily reduce the amount of damages awarded by the jury without any determination regarding whether the award was supported by the evidence at trial. The necessary component of judicial discretion was eviscerated, and the constitutional right to trial by jury was violated.

In sum, I conclude that because art 1, § 14 of our constitution guarantees the right to trial by jury, and because this right in Michigan includes the right to have the jury determine the amount of damages, see *Leary, supra* at 578, MCL 257.401(3) must be deemed unconstitutional. I note that in *Galayda v Lake Hosp Systems, Inc*, 71 Ohio St 3d 421, 427; 644 NE2d 298 (1994), the Supreme Court of Ohio ruled that a statute mandating that any future damages awards in excess of \$200,000 be paid in a series of periodic payments violated the constitutional right to trial by jury because it deprived the plaintiff of the full value of the jury's award by reducing the interest available on the award. The court emphasized the following:

It is well established that the right of trial by jury in this state is a fundamental and substantial right guaranteed by the Ohio Constitution. . . . Included in that right is the right to have a jury determine all questions of fact, including the amount of damages to which the plaintiff is entitled. [*Id.* at 425.]

Michigan similarly guarantees a plaintiff a jury trial with respect to damages, and if depriving a plaintiff of interest on a jury's award violates the constitutional right to a jury trial, then surely an arbitrary reduction of a \$250,000 award to \$20,000 violates the right to a jury trial.³

I would affirm.

/s/ Patrick M. Meter

³ See also *Lakin v Senco Products, Inc*, 329 Or 62, 78-82; 987 P2d 463 (1999), amended 329 Or 369; 987 P2d 476 (1999), and *Smith v Dep't of Ins*, 507 So 2d 1080, 1088-1089 (Fla, 1987), for additional authority supporting my position today.